LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
JAN. 8 1967
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 647

LOUIS BOSTICK,

Petitioner,

—v.—

STATE OF SOUTH CAROLINA, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF SOUTH CAROLINA

BRIEF FOR PETITIONER

MATTHEW J. PERRY
1107½ Washington Street
Columbia, South Carolina

CHARLES E. WASHINGTON, JR.
905 North Street
Beaufort, South Carolina

Attorneys for Petitioner

INDEX

SUBJECT INDEX

BRIEF FOR PETITIONER

	Page
Opinion Below	1
Jurisdiction	1
Constitutional Provision Involved	2
Question Presented	2
Statement	2
ARGUMENT:	
Due Process of Law and Equal Protection of the Law Guaranteed by the Fourteenth Amendment Were Denied Petitioner in That the Grand Jury Which Indicted Him and the Petit Jury Which Tried and Convicted Him Were So Constituted as to Systematically Exclude Negroes	4
Conclusion	9

TABLE OF CASES AND OTHER AUTHORITIES

CASES:

Akins v. *State of Texas*, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692	5, 7
Arnold v. *North Carolina*, 376 U. S. 773, —— L. Ed. ——, 84 S. Ct. 1033	5, 8
Avery v. *Georgia*, 345 U. S. 559, —— L. Ed. ——, 73 S. Ct. 891	5, 7
Carter v. *State of Texas*, 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839	4
Cassell v. *State of Texas*, 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. 839	5, 7
Eubanks v. *Louisiana*, 356 U. S. 584, 2 L. Ed. (2d) 991, 78 S. Ct. 970	4

	Page
Gibson v. *State of Mississippi*, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075	4
Hale v. *Commonwealth of Kentucky*, 303 U. S. 613, 58 S. Ct. 753, 82 L. Ed. 1050	5
Hernandez v. *State of Texas*, 347 U. S. 475, 74 S. Ct. 667, 98 L. Ed. 866	5
Hill v. *State of Texas*, 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559	5
Martin v. *State of Texas*, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497	4
Neal v. *State of Delaware*, 103 U. S. 370, 26 L. Ed. 567	4
Norris v. *State of Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074	4-5
Patton v. *State of Mississippi*, 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76	5
Pierre v. *State of Louisiana*, 306 U. S. 354, 59 S. Ct. 536, 83 L. Ed. 757	5
Reece v. *State of Georgia*, 350 U. S. 85, 76 S. Ct. 167, 100 L. Ed. 77	5
Rogers v. *State of Alabama*, 192 U. S. 226, 24 S. Ct. 257, 48 L. Ed. 417	4
Smith v. *State of Texas*, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84	5, 6
Strauder v. *State of West Virginia*, 100 U. S. 303, 25 L. Ed. 664	4, 5
State v. *Grant*, 199 S. C. 412, 19 S. E. (2d) 638	7
State v. *Rector*, 158 S. C. 212, 155 S. E. 385	7
State v. *Waitus*, 224 S. C. 12, 77 S. E. (2d) 256	7
Swain v. *Alabama*, 380 U. S. 202, —— L. Ed. ——, —— S. Ct. ——	5

STATUTES:

	Page
United States Constitution, Fourteenth Amendment, Section 1	2, 4
South Carolina Constitution, Article 5, Section 22	7
South Carolina Constitution, Article 2, Section 4	8
Section 23-62, Code of Laws of South Carolina, 1962	8
Title 42, U. S. C., Section 1973	7

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 647

LOUIS BOSTICK,

Petitioner,

—v.—

STATE OF SOUTH CAROLINA, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of South Carolina (R. 117-126) is reported at 245 S. C. ——, 145 S. E. (2d) 439.

Jurisdiction

The judgment of the Supreme Court of South Carolina was entered November 30, 1965. Rehearing was denied December 14, 1965. Petition for Writ of Certiorari was

filed in this Court March 14, 1966. The Petition for Writ of Certiorari and the Petition for Leave to Proceed in Forma Pauperis were granted October 10, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257(3), petitioner having asserted below and claiming here, rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Constitutional Provision Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Whether due process of law guaranteed by the Fourteenth Amendment was denied petitioner by selection of the grand jury which indicted him and of the petit jury which tried him on the basis of race.

Statement

Petitioner, Louis Bostick, was arrested January 18, 1962 and charged with the murder of Jasper County South Carolina Sheriff C. W. Floyd who was shot to death earlier the same day (R. 11). Petitioner was thereafter tried, convicted of murder and senteneed to death (R. 117). On appeal to the Supreme Court of South Carolina, the conviction and sentence were affirmed. *State* v. *Bostick*, 243 S. C. 14, 131 S. E. (2d) 841. Thereafter petitioner filed a petition for writ of habeas corpus alleging that his detention and sentence violate the United States Constitution

upon the several grounds therein alleged and including the assertion that Negroes were systematically excluded from the grand and petit juries which indicted, tried and convicted him (R. 2, 3, 4, 5). The petition was denied. On appeal, the judgment was affirmed by the Supreme Court of South Carolina. *Bostick* v. *State of South Carolina, et al.*, 245 S. C. ——, 145 S. E. (2d) 439.

The evidence adduced upon the ground that Negfoes were excluded from the grand and petit juries is that the population of Jasper County South Carolina is about evenly divided racially (R. 64);[1] that at the beginning of 1962 there were 947 qualified white male electors and 246 qualified Negro male electors in Jasper County (R. 81, 82); that only one Negro has served on the grand jury of Jasper County (R. 28, 29, 66, 67, 68, 69, 70, 71); that there are usually one or two Negroes on the panel of petit jurors (R. 69); that the Clerk of Court who is one of the statutory jury commissioners can determine the race of a prospective juror as soon as he observes his name (R. 66); that in 1954 an indictment was quashed in another criminal case in Jasper County, the trial judge having found racial discrimination in the manner of selection of the grand and petit jurors (R. 70); and that the Jury Commission has not changed its method of selecting jurors (R. 70, 75). Additionally, it was shown that a "good many" Negroes, though registered "can't read and write barely" and are "disqualified to begin with" (R. 75, 76). As was stated by the Clerk of Court (R. 76):

[1] The U. S. Census Report, 1960, indicates the adult white population of Jasper County as 2,689 and the adult Negro population as 3,333.

"Well, with the representation of the county and the ones that are qualified to serve, I couldn't tell you without I studied them over and saw the qualifications of the juror. We have some that can't read and write barely, and yet they have been registered. Would you want him to judge you or anybody else? I'm going to strike a white man like that if I know it, and I have to boil them down to what I figure is—I say not I, we figure are qualified."

ARGUMENT

Due Process of Law and Equal Protection of the Law Guaranteed by the Fourteenth Amendment Were Denied Petitioner in That the Grand Jury Which Indicted Him and the Petit Jury Which Tried and Convicted Him Were So Constituted as to Systematically Exclude Negroes.

In *Eubanks* v. *Louisiana*, 356 U. S. 584, 2 L. Ed. (2d) 991, 78 S. Ct. 970, Mr. Justice Black stated the principle upon which petitioner relies as follows:

"In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied the equal protection of the laws guaranteed by the Fourteenth Amendment if he is indicted by a grand jury or tried by a petit jury from which members of his race have been excluded because of their race."[2]

---

[2] *Strauder* v. *State of West Virginia*, 100 U. S. 303, 25 L. Ed. 664; *Neal* v. *State of Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Gibson* v. *State of Mississippi*, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075; *Carter* v. *State of Texas*, 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839; *Rogers* v. *State of Alabama*, 192 U. S. 226, 24 S. Ct. 257, 48 L. Ed. 417; *Martin* v. *State of Texas*, 200 U. S. 316, 26 S. Ct. 338, 50 L. Ed. 497; *Norris* v. *State of Alabama*, 294 U. S. 587, 55

The Court below evidenced understanding of this principle (R. 119, 120) but declined to apply it to the facts of this case.

Petitioner submits that the proof here demonstrates systematic exclusion of Negroes from the grand jury which indicted him and from the petit jury which tried and convicted him. That proof is as follows:

Clerk of Court R. L. Sensenback testified that he had been Clerk of Court in Jasper County 14 years (R. 64). He could not recall a Negro serving on the grand jury of Jasper County except during 1962 when one Negro served upon the grand jury which indicted petitioner (R. 66, 67, 68, 69, 70, 71). He testified also that the names of Negroes are in the jury box in proportion to the male white electors registered and qualified (R. 71); that there are usually one or two Negroes on the petit jury panel (R. 69); that he and the other Jury Commissioners made no changes in the methods of selecting jurors after a South Carolina Judge found discrimination in the manner of jury selec-

---

S. Ct. 579, 79 L. Ed. 1074; *Hale* v. *Commonwealth of Kentucky*, 303 U. S. 613, 58 S. Ct. 753, 82 L. Ed. 1050; *Pierre* v. *State of Louisiana*, 306 U. S. 354, 59 S. Ct. 536, 83 L. Ed. 757; *Smith* v. *State of Texas*, 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84; *Hill* v. *State of Texas*, 316 U. S. 400, 62 S. Ct. 1159, 86 L. Ed. 1559; *Akins* v. *State of Texas*, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692; *Patton* v. *State of Mississippi*, 332 U. S. 463, 68 S. Ct. 184, 92 L. Ed. 76; *Cassell* v. *State of Texas*, 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. 839; *Hernandez* v. *State of Texas*, 347 U. S. 475, 74 S. Ct. 667, 98 L. Ed. 866; *Reece* v. *State of Georgia*, 350 U. S. 85, 76 S. Ct. 167, 100 L. Ed. 77; *Strauder* v. *State of West Virginia*, 100 U. S. 303, 25 L. Ed. 664.

See also *Avery* v. *Georgia*, 345 U. S. 559, —— L. Ed. ——, 73 S. Ct. 891; *Arnold* v. *North Carolina*, 376 U. S. 773, —— L. Ed. ——, 84 S. Ct. 1033; and *Swain* v. *Alabama*, 380 U. S. 202, —— L. Ed. ——, —— S. Ct. ——.

tion in 1954 (R. 75); and that he could offer no explanation concerning why so few Negroes had been called to serve upon the grand and petit juries of Jasper County (R. 72) although he had no purpose to discriminate (R. 74, 75).

Another witness testified that he regularly attends Court sessions in Jasper County (R. 28) and that during eight or nine years he had observed only one Negro serving on the grand jury (R. 28, 29); and that the fact that a Negro served upon the grand jury which indicted petitioner was "unusual" (R. 30). There were no Negroes on the petit jury which tried and convicted petitioner although there were two Negroes on the panel from which the petit jury was selected (R. 32).

The record clearly reveals without dispute that for many years only one Negro has been called or served on the grand jury of Jasper County. That this one Negro served on the grand jury which returned the indictment against petitioner can hardly be contended as refutation of the strong evidence indicating exclusion (or limitation) of Negro citizens from service on the grand juries of Jasper County. See *Smith* v. *Texas,* 311 U. S. 128, 61 S. Ct. 164, 85 L. Ed. 84.

This Court has recognized a positive duty on the part of jury commissioners to select jurors without discrimination on the ground of race. Petitioner submits that the record here reflects a prima facie case of discrimination. Petitioner need not show ill will, evil motive or absence of good faith. But petitioner is entitled under the constitution to require that those who are trusted with jury selection shall not pursue a course of conduct that results in discrim-

ination in the selection of jurors on racial grounds. *Akins* v. *Texas*, 325 U. S. 398, 89 L. Ed. 1692, 65 S. Ct. 1276.

In *Cassell* v. *Texas*, 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629, this Court stated:

> "Jurymen should be selected as individuals, on the basis of individual qualification, and not as members of a race. . . . Proportional racial limitation is therefore forbidden. An accused is entitled to have the charges against him considered by a jury in the selection of which there has been neither inclusion or exclusion because of race."

It is significant here that the jury commission can identify a potential juror as white or Negro merely by observing his name except in a few cases where some white and Negro persons have the same name (R. 70). Thus the opportunity to make racial distinction is as apparent as was found to be the case in *Avery* v. *Georgia*, 345 U. S. 559. This includes the opportunity to maintain a "fair representation" (R. 75) after excluding some potential Negro jurors on the ground that they are "disqualified to begin with" (R. 75).[5]

---

[5] The disqualification in some instances was said to be that they "can't read and write barely, and yet have been registered" (R. 76). Literacy was not a prerequisite for service upon grand or petit juries in South Carolina at the time this case arose. *Article 5, Section 22, Constitution of South Carolina.* The only requirement was that the prospective juror be a qualified male elector which meant registered male elector. *State* v. *Rector*, 158 S. C. 212, 155 S. E. 385; *State* v. *Grant*, 199 S. C. 412, 19 S. E. (2d) 638; *State* v. *Waitus*, 224 S. C. 12, 77 S. E. (2d) 256. Prior to enactment of the 1965 Voting Rights Act (42 U. S. C., Section 1973) South Carolina law required that one seeking to register demonstrate his ability to read and write any Section of the Constitution

To summarize, it is submitted that a prima facie case of racial discrimination in the selection of grand and petit juries in Jasper County South Carolina has been set forth. As was stated by the Court in *Arnold* v. *North Carolina, supra*:

> "The situation here is quite like that in *Eubanks* v. *Louisiana,* 356 U. S. 584, 586, 78 S. Ct. 970, 973, 2 L. Ed. (2d) 991, where systematic exclusion of Negroes from grand jury duty was found.
>
> In that case:
>
> 'Although Negroes comprise about one-third of the population of the parish, the uncontradicted testimony of various witnesses established that only one Negro had been picked for grand jury duty within memory. . . . From 1936, when the Commission first began to include Negroes in the pool of potential jurors, until 1954, when petitioner was indicted, 36 grand juries were selected in the parish. Six more Negroes were included in each list submitted to the local judges. Yet, out of 432 jurors selected only the single Negro was chosen.' "

---

submitted to him . . . or can show that he owns and has paid taxes during the previous year on property in the state assessed at $300.00 or more. Article 2, Section 4, Constitution of South Carolina; Section 23-62, Code of Laws of South Carolina, 1962.

Conclusion

WHEREFORE, it is respectfully submitted that the judgment of the Supreme Court of South Carolina be reversed.

Respectfully submitted,

MATTHEW J. PERRY
1107½ Washington Street
Columbia, South Carolina

CHARLES E. WASHINGTON, JR.
905 North Street
Beaufort, South Carolina

Attorneys for Petitioner